

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

**FRIEDMAN & FRIEDMAN, LTD.,
an Illinois Corporation,**

Plaintiff,

vs.

**TIM McCANDLESS INC.,
an Iowa Corporation, and
PAUL ROLOFF,**

Defendants.

No. C05-2007

FINAL JURY INSTRUCTIONS

FINAL INSTRUCTION NO. 1

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

FINAL INSTRUCTION NO. 2

The fact that Friedman & Friedman, LTD., and Tim McCandless, Inc., are corporations should not affect your decision. All persons are equal before the law, and corporations, whether large or small, are entitled to the same fair and conscientious consideration by you as any other person.

FINAL INSTRUCTION NO. 3

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider a witness' intelligence, the opportunity a witness had to see or hear the things testified about, a witness' memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

FINAL INSTRUCTION NO. 4

You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness' education and experience, the reasons for the opinion, and all the other evidence in the case.

FINAL INSTRUCTION NO. 5

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claims rely upon that fact. The party who has the burden of proving a fact must prove it by the greater weight or preponderance of the evidence. To prove something by the greater weight or preponderance of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.

In some instances, you will be instructed that a fact must be proven by "clear, convincing, and satisfactory" evidence. Evidence is clear, convincing, and satisfactory if there is no serious or substantial uncertainty about the conclusion to be drawn from it.

The greater weight or preponderance of the evidence, or whether a fact has been proven by clear and convincing evidence, is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

FINAL INSTRUCTION NO. 6

Regarding its claim for breach of contract, Plaintiff must prove all of the following propositions:

1. The existence of a contract.
2. The terms of the contract.
3. Defendants breached the contract.
4. The amount of any damage Defendants caused.

If Plaintiff has failed to prove any of these propositions, then Plaintiff is not entitled to damages on this claim and you will consider its remaining claims. If Plaintiff has proved all of these propositions, then Plaintiff is entitled to damages in some amount.

FINAL INSTRUCTION NO. 7

Regarding element No. 1 of Instruction No. 6, the existence of a contract requires a meeting of the minds on the material terms. This means the parties must agree upon the same things in the same sense. You are to determine if a contract existed from the words and acts of the parties, together with all reasonable inferences you may draw from the surrounding circumstances.

Parties to a contract have an obligation of good faith in the performance or enforcement of their contractual duties. "Good faith" means honesty in fact in the conduct or transaction concerned.

Plaintiff claims that a contract existed when Paul Roloff signed and returned the letter from Eugene Friedman, dated April 24, 2002. Defendants claim that a contract did not exist until Arie Friedman signed the "Aircraft Purchase Agreement" dated May 10, 2002. In determining whether the letter of April 24, 2002, was a valid contract or merely preliminary negotiations, there are a number of factors you may consider, including the following:

- a. Whether the contract is of a class usually found in a letter agreement.
- b. Whether it is of a type needing a formal writing for its full expression.
- c. Whether it has few or many details.
- d. Whether the amount is large or small.
- e. Whether the contract is common or unusual.
- f. Whether all details have been agreed upon or some remain unresolved.
- g. Whether the negotiations show some further writing was discussed or contemplated.
- h. Any other evidence tending to show whether the parties intended to be bound by the document.

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INSTRUCTION NUMBER 7 (Cont'd)

Plaintiff claims that Defendants knew that Arie Friedman lacked the authority to sign the "Aircraft Purchase Agreement" on behalf of Friedman & Friedman LTD. Defendants claim that even if Arie Friedman lacked actual authority, he acted with "apparent authority." Apparent authority is authority which, although not actually granted, has been knowingly permitted by the principal or which the principal holds the agent out as possessing. Apparent authority must be determined by what the principal does, rather than by any acts of the agent. For apparent authority to exist, the principal must have acted in such a manner as to lead persons dealing with the agent to believe the agent has authority. A principal is bound by the acts of the agent within the scope of his apparent authority as to any person who, based upon the acts of the principal, believes and has reasonable ground to believe that the agent has such authority, and in good faith deals with him. The burden of showing that Arie Friedman acted within the scope of his actual or apparent authority is on Defendants.

Regarding element No. 2 of Instruction No. 6, in determining the terms of the contract you may consider the following:

- a. The intent of the parties along with a reasonable application of the surrounding circumstances.
- b. The intent expressed in the language used prevails over any secret intention of either party.
- c. The intent may be shown by the practical construction of a contract by the parties and by the surrounding circumstances.
- d. You must attempt to give meaning to all language of a contract. Because an agreement is to be interpreted as a whole, assume that all of the language is necessary. An interpretation which gives a reasonable, effective meaning to all terms is preferred to an interpretation which leaves a part of the contract unreasonable or meaningless.

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INSTRUCTION NUMBER 7 (Cont'd)

e. The meaning of a contract is the interpretation a reasonable person would give it if they were acquainted with the circumstances both before and at the time the contract was made.

f. Ambiguous language in a written contract is interpreted against the party who selected it.

g. Where general and specific terms in the contract refer to the same subject, the specific terms control.

Regarding element No. 3 of Instruction No. 6, a breach of the contract occurs when a party fails to perform a term of the contract.

FINAL INSTRUCTION NO. 8

Regarding its claim for fraudulent misrepresentation, Plaintiff must prove the following propositions by a preponderance of clear, satisfactory, and convincing evidence:

1. Defendants made one or more of the following representations to Plaintiff regarding the aircraft:

- (a) The aircraft at the time of purchase was properly certified for flight by the Federal Aviation Administration and airworthy;
- (b) The aircraft at the time of purchase was safe for flight;
- (c) The aircraft at the time of purchase would have all of the promised accessories and components.

2. At least one of the representations was false.

3. The representation was material.

4. Defendants knew the representation was false.

5. Defendants intended to deceive Plaintiff.

6. Plaintiff acted in reliance on the truth of the representation and was justified in relying on the representation.

7. The representation was a proximate cause of Plaintiff's damage.

8. The amount of damage.

If Plaintiff has failed to prove any of these propositions, then Plaintiff cannot recover damages on this claim. If Plaintiff has proved all of these propositions, then Plaintiff is entitled to recover damages in some amount.

FINAL INSTRUCTION NO. 9

Regarding element No. 1 of Instruction No. 8, "a representation" is any word or conduct asserting the existence of a fact. It may include silence if Defendants fail to disclose information which Defendants have a duty to disclose and which Plaintiff has reason to believe will be disclosed.

Regarding element No. 3 of Instruction No. 8, a representation is "material" if:

- a. A reasonable person would consider it as important in making a decision.
- b. Defendants know or have reason to know that Plaintiff considers, or is likely to consider, the representation as important in making a decision.
- c. The representation influences a person to enter into a transaction which would not have occurred otherwise.

Regarding element No. 4 of Instruction No. 8, Defendants knew the representation was false if any of the following situations existed:

- a. Defendants actually knew or believed the representation was false.
- b. Defendants made the representation without belief in its truth or in reckless disregard of whether it was true or false.
- c. Defendants falsely stated or implied that the representation was based on their personal knowledge or investigation.
- d. Defendants made a representation which they knew or believed was materially misleading because it left out unfavorable information.
- e. Defendants stated their intention to do or not to do something when they did not actually have that intention.
- f. Defendants knew the representation could be understood in both a true and false manner, and made the representation (i) intending that it be understood in the false

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INSTRUCTION NUMBER 9 (Cont'd)

sense, (ii) having no belief as to how it would be understood, or (iii) in reckless disregard of how it would be understood.

Regarding element No. 5 of Instruction No. 8, Defendants intended to deceive Plaintiff if any of the following situations existed when they made a representation:

- a. Defendants wanted to deceive Plaintiff or believed that Plaintiff would in all likelihood be deceived.
- b. Defendants had information from which a reasonable person would conclude that Plaintiff would be deceived.
- c. Defendants made the representation without concern for the truth.

Regarding element No. 6 of Instruction No. 8, Plaintiff must rely on the representation and the reliance must be justified. It is not necessary that the representation be the only reason for Plaintiff's action. It is enough if the representation was a substantial factor in bringing about the action. Whether reliance is justified depends on what Plaintiff can reasonably be expected to do in light of its own information and intelligence.

Regarding element No. 7 of Instruction No. 8, the conduct of a party is a proximate cause of damages when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct. "Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause. A particular result may have more than one proximate cause.

FINAL INSTRUCTION NO. 10

Regarding element number 4 of Instruction No. 6 and element number 8 of Instruction No. 2, if you find Plaintiff is entitled to recover on its claims of breach of contract or fraudulent misrepresentation, then the measure of damages is an amount that would place Plaintiff in as good a position as it would have enjoyed if the contracts had been performed or Defendants' representations had been true. The damages you award for breach of contract or fraudulent misrepresentation must be foreseeable or have been reasonably foreseen at the time the parties entered into the contracts or the representations were made. In your consideration of the damages, you may consider the cost of repairs necessary to bring the aircraft in compliance with the terms of the contract, and other damages incurred by Plaintiff as a result of Defendants' misrepresentations.

In arriving at the amount of damages, you cannot establish a figure by taking down the estimate of each juror as to damages and agreeing in advance that the average of those estimates shall be your award for damages. Rather, you must use your sound judgment based upon impartial consideration of the evidence.

FINAL INSTRUCTION NO. 11

In addition to compensatory damages, Plaintiff also claims entitlement to "punitive damages." An intentional breach of contract or fraudulent misrepresentation does not by itself give rise to an award of punitive damages. Punitive damages may be awarded if Plaintiff has proven by a preponderance of clear, convincing, and satisfactory evidence that Defendants' conduct constituted willful and wanton disregard for the rights or safety of another and caused actual damage to Plaintiff.

Conduct is willful and wanton when a person intentionally does an act of an unreasonable character in disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow.

Punitive damages are not intended to compensate for loss but are allowed to punish and discourage Defendants and others from like conduct in the future. You may award punitive damages only if Defendants' conduct warrants a penalty in addition to the amount you award to compensate for Plaintiff's actual losses.

There is no exact rule to determine the amount of punitive damages, if any, you should award. In fixing the amount of punitive damages, you may consider all of the evidence, including:

1. The nature of Defendants' conduct that harmed Plaintiff.
2. The amount of punitive damages which will punish and discourage like conduct by Defendants. You may consider Defendants' financial condition or ability to pay. You may not, however, award punitive damages solely because of Defendants' wealth or ability to pay.
3. Plaintiff's actual damages. The amount awarded for punitive damages must be reasonably related to the amount of actual damages you award to Plaintiff.

FINAL INSTRUCTION NO. 12

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone - including me - how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be - that is entirely for you to decide.

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INSTRUCTION NUMBER 12 (Cont'd)

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the Court Security Officer that you are ready to return to the courtroom.

DATED this 28th day of March, 2008.



JON STUART SCOLES
United States Magistrate Judge
NORTHERN DISTRICT OF IOWA